Chapter XI

DECISIONS: DIVISION OF MEDICAL QUALITY

A. General Description of Functions

The Medical Board's Division of Medical Quality (DMQ), which consists of fourteen of MBC's 21 members (eight physicians and six public members), is the Board's enforcement arm. As described in prior chapters, it oversees a large enforcement staff and adopts final adjudicative decisions in disciplinary matters against its licensees.

Adjudicative or "quasijudicial" decisionmaking is generally governed by the Administrative Procedure Act (APA).[247] It differs fundamentally from all other types of agency decisionmaking, and the courts and Legislature have adopted special rules to ensure that the due process rights of the respondent — who stands to lose a vested constitutional property right — are preserved. Of import, the burden is on the agency to prove a disciplinable violation by "clear and convincing evidence to a reasonable certainty."[248] Under the APA and constitutional law, the respondent has a right to a written statement of the charges (the "accusation") that sets forth the acts or omissions with which she has been charged with sufficient specificity to enable her to prepare a defense.[249] Thereafter, the respondent is entitled to some discovery rights,[250] a noticed and public hearing[251] at which the respondent may be represented by counsel (at his/her expense), testimony under oath,[252] the right to

[247] Gov't Code § 11370 *et seq*.

[248] *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal. App. 3d 853.

[249] Gov't Code § 11503.

[250] *Id*. at § 11507.6. APA discovery is not as expansive as civil discovery, in that interrogatories and depositions are generally not allowed.

[251] *Id*. at §§ 11425.10(a)(3), 11509.

[252] *Id*. at § 11513(a).

cross-examine and confront witnesses,[253] the issuance of a formal decision,[254] and judicial review of the agency's decision.[255] Of critical importance, the respondent is also entitled to a decisionmaker who is neutral and unbiased,[256] and who decides the matter based upon evidence that has been lawfully gathered and admitted at a public hearing.[257]

Another mechanism utilized by DMQ and other adjudicative bodies attempts to protect the constitutional rights of the respondent. In imposing disciplinary sanctions, the DMQ panel must consider the Division's "disciplinary guidelines," which set forth the Division's preferred range of sanctions for every given violation of the Medical Practice Act and the Board's regulations.[258] While not binding standards, these disciplinary guidelines attempt to ensure consistency in DMQ decisionmaking — an important component of equal protection.

DMQ is the final decisionmaker in all MBC disciplinary matters in which an accusation has been filed. However, as described above, DMQ does not personally preside over or even attend APA evidentiary hearings; that responsibility is delegated to an administrative law judge (ALJ) from the Office of Administrative Hearings' Medical Quality Hearing Panel (MQHP), who prepares a proposed decision (PD) for DMQ's review. Nor does DMQ negotiate the terms of stipulated settlements that avoid an evidentiary hearing; that responsibility is delegated to its counsel (HQE) and its staff, who negotiate proposed settlements with the respondent and his/her counsel and present them to DMQ for review. DMQ reviews all proposed case dispositions that follow the filing of an accusation — including all PDs (including ALJ recommendations that an accusation be dismissed),

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[253] *Id.* at § 11513(b).

[254] *Id.* at §§ 11425.10(a)(6), 11425.50, 11517, 11518.

[255] *Id.* at § 11523; *see also* Civ. Proc. Code § 1094.5.

[256] Gov't Code §§ 11425.10(a)(5), 11425.40. *See also Gibson v. Berryhill* (1973) 411 U.S. 564; *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal. 2d 436; *Allen v. California Board of Barber Examiners* (1972) 25 Cal. App. 3d 1014; and the long series of cases involving the New Motor Vehicle Board, including *American Motor Sales Corp. v. New Motor Vehicle Board* (1977) 69 Cal. App. 3d 983; *Chevrolet Motor Division v. New Motor Vehicle Board* (1983) 146 Cal. App. 3d 353; *Nissan Motor Corp. v. New Motor Vehicle Board* (1984) 153 Cal. App. 3d 109; *University Ford Chrysler-Plymouth v. New Motor Vehicle Board* (1986) 179 Cal. App. 3d 796.

[257] Decisions must be made based on evidence lawfully admitted at the public hearing, and not on off-the-record "ex parte" communications with either the presiding officer at the hearing, Gov't Code § 11430.10, or the governmental official or body entrusted with making the ultimate decision, Gov't Code § 11430.70. *See also* Bus. & Prof. Code § 2335(c)(2).

[258] Effective July 1, 1997, Government Code section 11425.50 requires occupational licensing boards to codify their disciplinary guidelines in their regulations. MBC has adopted section 1361, Title 16 of the California Code of Regulations, which incorporates by reference the 2003 version of the Board's disciplinary guidelines.

stipulated settlements, license surrenders, and default judgments.[259] In APA jargon, DMQ is authorized to "adopt" or "nonadopt" proposed case dispositions; in so doing, it is the final judge in the disciplinary matter. It makes the final agency decision which is then subject to judicial review.

For purposes of reviewing PDs, stipulated settlements, and other proposed case dispositions, DMQ divides into two seven-member panels (called "Panel A" and "Panel B"); a proposed case disposition is randomly assigned to one of the panels for review.[260] As presented in Exhibit XI-A below, DMQ panels review and act upon an average total of 54 PDs and 195 stipulated settlements each year.

Generally, Government Code section 11517 — part of the APA — governs a board's review of a PD. However, special rules apply to a DMQ panel's review of a proposed decision:

(1) A DMQ panel must give "great weight to the findings of fact of the administrative law judge, except to the extent those findings of fact are controverted by new evidence."[261] This "great weight" requirement was added by SB 609 (Rosenthal) in 1995,[262] and is based on the fundamental premise of American jurisprudence that the "trier of fact" should be the one who sees and hears the witnesses, has an opportunity to observe how they say what they say, and observe their credibility and demeanor.[263]

(2) Once MBC receives the PD, it must be assigned to a DMQ panel and sent by mail to each panel member within ten calendar days of receipt. Each member must vote whether to "approve the decision, approve the decision with an altered penalty, to refer the case back to the administrative law judge for the taking of additional evidence, to defer final decision pending discussion of the case by the panel . . . as a whole, or to nonadopt the decision."[264] Four votes are needed to adopt a decision, approve a decision with an altered penalty, refer the case back to the ALJ for the taking of

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[259] DMQ does not review interim suspension orders issued by MQHP ALJs; those are final when issued, Bus. & Prof. Code § 2335(b), subject to judicial review, Gov't Code § 11529(h). DMQ also does not review pre-filing public letters of reprimand, license surrenders while on probation, or withdrawn accusations (unless they are part of a stipulated settlement).

[260] Bus. & Prof. Code § 2230(b). This provision has not been updated to conform to SB 1950's addition of two new members to DMQ.

[261] *Id*. at § 2335(c)(1).

[262] *See supra* Ch. IV.E.

[263] The "great weight" provision in the enacted version of Business and Professions Code section 2335(c)(1) was a fallback position from an earlier version (August 21, 1995) which would have provided that DMQ is "bound by" the findings of fact of the ALJ.

[264] Gov't Code § 2335(c)(2).

additional evidence, or nonadopt the decision. Two votes will effectively "hold" the proposed decision for discussion of the case at the panel's next meeting. DMQ panel members must return their votes by mail to the Board within 30 days from receipt of the proposed decision.[265]

(3) The DMQ panel must take action on the proposed decision — that is, adopt it or nonadopt it — within 90 calendar days of the date it was received by the Board.[266] If two panel members vote to "hold" a proposed decision for discussion at the panel's next meeting (see above), that meeting must take place within the 90-calendar-day period.[267] If the panel takes no action on the PD within the 90-calendar-day period, the PD becomes final and subject to judicial review.[268]

(4) If the panel believes that the penalty should be more harsh than that recommended by the ALJ, the panel must nonadopt the decision within the 90-calendar-day period. Thereafter, it must order a record of the entire administrative proceeding (including a transcript of the hearing and all the documentary evidence), make it available to both parties,[269] and afford the parties an opportunity for oral argument before the panel prior to deciding the case.[270] Following oral argument, four votes are required to increase the penalty proposed by the ALJ, and "no member of the . . . panel may vote to increase the penalty except after reading the entire record and personally hearing any additional oral argument and evidence presented to the panel . . .."[271]

Once a DMQ panel has adopted a final decision and mailed it to the parties, that decision is subject to reconsideration "on its own motion or on petition of any party," within specified time limits prior to the effective date of the decision. Thereafter, the decision may be reconsidered by the panel itself or may be assigned to an ALJ.[272]

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[265] Bus. & Prof. Code § 2335(c)(3).

[266] *Id*.

[267] *Id*. at § 2335(c)(2).

[268] *Id*. at § 2335(c)(3).

[269] Gov't Code § 11517(c)(2)(E).

[270] Bus. & Prof. Code § 2335(c)(4). Under the APA, an agency that considers the penalty proposed by the ALJ too harsh may simply lower it and adopt the decision with the lowered penalty. Gov't Code § 11517(c)(2)(B). An agency that nonadopts a proposed decision because it does not believe the penalty recommended by the ALJ is sufficiently harsh must afford the parties "the opportunity to present either oral *or written* argument before the agency itself." Gov't Code § 11517(c)(2)(E)(ii) (emphasis added). However, a DMQ panel that is nonadopting a proposed decision must afford the respondent an opportunity for oral argument. Bus. & Prof Code § 2335(c)(4).

[271] *Id*. at § 2335(c)(5).

[272] Gov't Code § 11521.

Exhibit XI-A below presents recent DMQ activity in two areas — DMQ panel review of proposed decisions and stipulated settlements. It reveals that DMQ adopts most PDs (84% in 2003–04) and approves most stipulations (95% in 2003–04). When it nonadopts a decision, it generally increases the penalty recommended by the ALJ. Recall, however, that increasing the penalty is the only reason a panel must nonadopt a proposed decision — such that a harsher penalty after nonadoption is the expectable result. If the panel believes the recommended penalty is too harsh, it can simply reduce the penalty and approve the decision.[273]

EX. XI-A. Division of Medical Quality Review of ALJ Proposed Decisions and Stipulations

Activity	FY 1999–2000	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04
Total ALJ decisions	53	60	52	57	50
ALJ decisions adopted	45 (85%)	49 (82%)	39 (75%)	41 (72%)	42 (84%)
ALJ decisions nonadopted	8 (15%)	11 (18%)	13 (25%)	16 (28%)	8 (16%)
Subsequent disposition of nonadoptions	7 increased 1 upheld	8 increased 2 upheld 1 decreased	11 increased 2 upheld	13 increased 2 upheld	6 increased 2 pending
Total stipulations submitted	198	182	162	218	214
Stipulations approved	184 (93%)	171 (94%)	145 (90%)	205 (94%)	203 (95%)
Stipulations rejected	14 (7%)	11 (6%)	17 (10%)	13 (6%)	11 (5%)

Source: Medical Board of California

Exhibit XI-B below presents recent DMQ decisions on petitions for reconsideration under Government Code section 11521.

XI-B. Rulings on Petitions for Reconsideration

	FY 1999–2000	FY 2000–01	FY 2001–02	FY 2002–03	FY 2003–04
Petitions filed by Respondent	18	17	9	17	14
Petitions Granted	1	1	1	1	1
Petitions Denied	17	16	8	16	13
Petitions filed by DAG	2	4	4	4	5
Petitions Granted	1	3	1	1	4
Petitions Denied	1	1	3	3	1

Source: Medical Board of California

Finally, Exhibit X-A above presents DMQ's average cycle time from receipt of a PD to DMQ decision. In 2003–04, DMQ reviewed and reached a final decision on most PDs within 30 days (with the exception of the cases it nonadopted).

[273] *See supra* note 270. DMQ rarely reduces a proposed penalty.

B. Initial Concerns of the MBC Enforcement Monitor

Due to the press of other issues that we were required to address in this report, our examination of DMQ's performance during the first year of this project was limited to the data-gathering displayed above. To our knowledge, these data have not been gathered and/or presented in any way in recent memory, and may be valuable to Board members as they consider the following issues, which will be examined during the second year of this project.

1. The added value of DMQ review of proposed decisions is unclear.

As described in Chapter IV, *Code Blue* argued in 1989 that DMQ review of proposed decisions should be eliminated in favor of permitting the ALJ to make the final agency decision based on the agency's disciplinary guidelines and subject to a petition for judicial review by either side.[274] Legislation to implement this concept was unsuccessfully attempted in 1989, 1990, and 1993.[275] Although we find little support for that concept today among MBC and HQE staff, it resonates with defense counsel and the California Medical Association. While making no specific recommendation at this time, the Monitor will describe the reasons underlying the concept in hopes of promoting a constructive public dialogue on the issue during 2005.

Members of occupational licensing boards — which consist of "volunteers" who have full-time jobs in cities all over the state, convene for meetings once every three months, and who may be members of the profession regulated by the board on which they sit — may be well-suited to making certain kinds of decisions and less well-suited to making other kinds of decisions. For example, volunteer board members are capable of adopting regulations to guide the practice of a trade or profession and making other kinds of "quasilegislative" or policy decisions to guide the profession or board staff. However, in the view of the Monitor and others, volunteer board members are less well-suited to making decisions in quasijudicial proceedings on the rights of an individual licensee — which is of momentous importance to that licensee and to the Board's public protection mandate, calls for intense exposure to and knowledge of the evidence in the specific matter, and may require subject matter expertise in the intricacies and complexities of the particular specialty at issue.

When DMQ panel members receive a proposed decision in an adjudicative matter, that is all they have. They have had no prior involvement in the case as it has worked its way through the system — no knowledge of the facts or details of the investigation, prosecution, or hearing. They are not permitted any involvement in the pre-PD process. Because they are the final judges and their

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[274] *See supra* Ch. IV.B.

[275] *See supra* Ch. IV.C. and IV. D.

decision must be based on the evidence that has been admitted by the ALJ, they are permitted to have no external knowledge of the case. So they work from the proposed decision alone, and have no access to the record of the hearing before the ALJ. They were not present at the hearing and had no opportunity to observe the witnesses, their credibility and demeanor, or the evidence. They are not judges and generally have no familiarity with the rules of evidence or administrative procedure. They may not have any familiarity with the subject matter of the particular case, usually have no idea how similar cases have been decided, and usually consist in majority of people in the same profession or trade as the accused licensee.

Are those decisionmakers in the best position to make a high-quality decision in that particular matter? Are they the "neutral and unbiased tribunal" to which the respondent has a constitutional right? Are they the "neutral and unbiased tribunal" best suited to make a decision that serves the Board's "paramount" priority of public protection?[276] These are important issues. Some DMQ members may have medical expertise, but not "on point" expertise due to the specialization of the profession. They also lack optimum information about the specific matter. At the same time, they may have the expected general "bias" or empathy with colleagues — or be perceived by the public to be so influenced. They are members of the same profession.

The prior attempts to eliminate DMQ review of proposed decisions were intended to achieve two goals: (1) streamline the decisionmaking process to expedite it for the benefit of both the respondent and the public; and (2) create a limited number of decisionmakers who have both subject matter expertise and independence from the profession — as opposed to perpetuating a time-consuming and expensive system with layer after layer after layer of decisionmakers who are sequentially required to learn the details of a disciplinary matter. These twin touchstones — subject matter expertise and independence — have formed the foundation of prior proposals to permit the administrative judge who has presided over the hearing to make the final agency decision (subject to a petition for judicial review by either side). The judge was at the hearing and has seen and heard the witnesses, received all the documentary evidence, and heard the expert testimony submitted by both sides. The judge specializes in physician discipline matters and is familiar with the rules of procedure and evidence in administrative proceedings. The judge has both knowledge of the evidence and is independent of the profession — the twin touchstones that are most important in making a decision that is consistently fair and in the public interest. And if the judge makes a mistake — as judges sometimes do — that case will go to court more quickly and at less cost for both the agency and the respondent.

The data presented above are instructive. Historically, DMQ nonadopts very few proposed decisions, and rejects very few stipulations. Other factors also lead some to support elimination of

[276] Bus. & Prof. Code § 2229(a) and (c); *see also id.* at § 2001.1.

DMQ review. DMQ members have full-time jobs and busy lives; the burden of having to read multiple proposed decisions and boxes of hearing transcripts and evidence for each quarterly meeting may be too much to realistically ask of these volunteers. As such, there is no guarantee that all DMQ members read and/or fully understand the proposed decisions or hearing transcripts before voting on disciplinary action. And the time DMQ must spend on fact-finding in individual disciplinary matters leaves less time for other kinds of decisionmaking that is vitally needed and to which the members are better suited, such as rulemaking, policymaking, and oversight of important mechanisms such as the Diversion Program (see Chapter XV). The cost of the current system — including time, money, and lost opportunity costs — seems to outweigh the system's output: the nonadoption of very few proposed decisions and the rejection of very few stipulations.

Over the years, the Board and others who support DMQ review have advanced two arguments:

(1) "We nonadopt to impose a harsher penalty. We are harsher on our own than are the ALJs." That may be true. However, such harshness by members of a profession against one of their competitors or colleagues may be unfair to respondents, especially if it is inconsistent. The goal should not be harshness, but consistency — and some dispute the overall consistency of DMQ decisionmaking (see below).

(2) "DMQ review brings medical expertise to the process, because many DMQ members are physicians." DMQ review may bring generalized medical expertise to the decisionmaking process, but it is unclear how a psychiatrist on DMQ could bring subject matter expertise to a decision involving neurosurgery. It is unclear why that DMQ member with generalized medical expertise and specialized knowledge of psychiatry should be permitted to second-guess the opinions of the physicians who have reviewed the medical records and specific evidence in the particular matter[277] — to which the psychiatrist on DMQ has no access — or the judge who has immersed herself in the facts, law, and expert medical opinion peculiar to that particular matter.

In sum, due to the structure of the process, DMQ members generally lack the twin touchstones — maximum information and independence from the profession — necessary to engage in adjudicative decisionmaking in the public interest. Their talents and skills might be better directed to other kinds of decisionmaking.

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[277] As described in prior chapters, MBC's enforcement program incorporates and requires extensive physician review of the medical records, other evidence, and testimony in each individual case — from the "specialty reviewer" in the Central Complaint Unit, to the medical consultant in the district office, to the expert reviewer with on-point medical expertise who reviews the entire investigative report and all the evidence, and opines as to the standard of care applicable in the particular matter and whether the subject physician's conduct conformed to those standards.

2. The consistency of DMQ decisionmaking is unclear.

The fragmented structure of MBC's enforcement program makes it difficult to evaluate the consistency of decisionmaking at any point in the process, including DMQ review. Investigations are handled from twelve different offices; they are funneled into one of six HQE offices and thereafter into one of four OAH offices. Decisionmaking occurs at each of these steps — decisions to close cases, to move them further in the process, to seek disciplinary action, to impose disciplinary action. An evaluation of the overall consistency of this decisionmaking is almost impossible within the confines and resources of this project.

DMQ decisionmaking is superimposed on all the decisionmaking that occurs below, and it is also plagued with fragmentation. After all, DMQ is split into two panels, neither of which knows of the other's decisionmaking in similar cases. DMQ membership is constantly shifting and changing. There is little or no *stare decisis* — the legal doctrine under which courts adhere to precedent (prior decisionmaking in similar cases) on questions of law in order to ensure certainty, consistency, and stability in the administration of justice — in administrative agency proceedings. To promote *stare decisis* and consistent decisionmaking over time and across the shifting membership of DMQ panels, SB 916 (Presley) in 1993 required the Office of Administrative Hearings to publish the decisions of the Medical Quality Hearing Panel, "together with court decisions reviewing those decisions, and any court decisions relevant to medical quality adjudications" in a quarterly *Medical Discipline Report*.[278] The intent of the journal was to inform all parties — including licensees, HQE, respondent's counsel, and DMQ itself — of prior DMQ disciplinary decisionmaking in order to promote consistency and encourage settlements. A similar journal instituted at the State Bar in the early 1990s has accomplished precisely that.[279] Although the law enacted in SB 916 remains on the books today, the *Medical Discipline Report* has never been published. And it has been effectively superseded by the Legislature's enactment of Government Code section 11425.60 in 1995, which precludes a party from relying on or citing to a prior DMQ decision unless the Division has designated it as a "precedent decision." Although the "precedent decision" mechanism is intended to promote consistency in decisionmaking, encourage settlements, and avoid costly litigation, DMQ has made no use of its "precedent decision" authority under section 11425.60.

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[278] *See* Ch. IV.D. This requirement is now codified in Government Code section 11371(c).

[279] Rule 310 of the State Bar's Rules of Procedure requires the Bar to compile final disciplinary decisions of the Bar's Review Department (an appellate review body within the Bar) into a *California State Bar Court Reporter*; these decisions are binding on the Bar's hearing judges who preside over evidentiary hearings in attorney discipline matters. Note that the State Bar is not subject to the APA and does not use OAH ALJs at attorney discipline hearings; the Bar has its own staff of hearing and appellate judges who specialize in attorney discipline matters. Note also that the State Bar Board of Governors does not review final disciplinary decisions made by the appellate Review Department; those are reviewable only by the California Supreme Court.

3. The procedure utilized at DMQ oral arguments is flawed.

Since 1986, the Monitor has personally attended literally hundreds of DMQ oral arguments on nonadoptions. The procedure employed is quite unusual. And if the Monitor — an attorney — thinks it is unusual, one can only wonder about the impressions of the public and the respondents whose licenses and livelihoods are potentially at stake.

The scenario is as follows: A DMQ panel has nonadopted a proposed decision. The only reason a DMQ panel needs to nonadopt a PD is to consider a harsher penalty than that recommended by the ALJ. So the respondent physician turns into a petitioner — pleading with the panel to either leave the ALJ's proposed penalty alone or lower it, but certainly not to increase it. That respondent must be mystified when he arrives at the hearing to find that the Board is represented by its own counsel — HQE. In effect, the "client" hears argument from its own counsel, with which it frequently interacts and upon whom it depends for legal advice on a myriad of matters. The Monitor would not be surprised to learn that respondents feel disadvantaged, as if there is a level of unfairness built into the process.

Procedurally, the respondent is usually permitted to argue first. The HQE DAG is given equal time to respond, and each side is afforded a brief rebuttal. In making oral argument, the lawyers are required to confine themselves to evidence that is "in the record" — that is, evidence that has been presented at the evidentiary hearing and admitted by the ALJ. The DMQ members have all of this evidence, because in nonadoption cases the entire transcript and record of the evidentiary hearing are ordered and delivered to all panel members, and by law all of them are required to "read . . . the entire record and personally hear . . . any additional oral argument and evidence presented to the panel" before voting on the nonadoption.[280] However, counsel do not always confine themselves to the record, and an objection to the argument may be voiced — requiring a ruling on the objection.

Historically, the chair of the DMQ panel — usually a physician, usually (and understandably) not well-versed in litigation procedures and responding instantly to evidentiary challenges — presided at these oral arguments and was expected to rule on objections. On those occasions, in-house MBC lawyers would attempt to assist the panel chair in ruling on objections; inasmuch as those individuals generally report to the "prosecutor" in the matter (MBC's executive director), that procedure left something to be desired. Due to these problems and the considerable mischief that resulted, 1995's SB 609 (Rosenthal) required MBC to adopt regulations governing the procedure at

[280] *See supra* note 271.

oral arguments,[281] and those regulations now require an ALJ to preside at oral argument.[282] Of course, this cannot be the same ALJ who presided over the hearing and whose decision was nonadopted in the matter at issue, so the ALJ presiding at oral argument necessarily has little or no knowledge of the sometimes voluminous record in the underlying matter. As opposed to the panel chair, this judge might be somewhat more successful in controlling the proceeding, ruling on objections, and requiring counsel to cite to the record when there is a question as to whether argument is based on the record. However, the required presence of the ALJ adds more expense to this process, and interrupts the hearing schedule of that MQHP ALJ.

Then, in what is by far the most unusual aspect of the proceeding, the respondent himself must be given an opportunity to personally address the panel,[283] and members of the DMQ panel are permitted to question either counsel or the respondent. Neither the statute nor the regulations require that the respondent be put under oath when he makes this statement or answers questions. Respondents sometimes stray from the record and/or the topic at hand, and are subject to objections. Well-meaning DMQ panel members often ask questions outside the record, and are subject to more objections.

Suffice it to say that the process — both in substance and in appearance — leaves a dissatisfied taste in the mouths of most members of the audience, especially lawyers. This entire process and its attendant costs could be obviated if the original ALJ's decision were designated as the final decision.

4. DMQ's procedures on motions for a stay in order to seek reconsideration appear unfair.

The defense counsel we interviewed raised two procedural issues related to petitions for reconsideration of a final DMQ decision. As described above, Government Code section 11521 permits either party to seek reconsideration of a final DMQ decision prior to its effective date (which is usually 30 days after DMQ adoption of the decision). Defense counsel assert that defense petitions for reconsideration are almost always denied, while HQE petitions for reconsideration are often granted.

Exhibit XI-B above presents data on the number and outcome of petitions for reconsideration filed in the past five years. Defense counsel are correct. In the past five years, defense counsel filed

[281] Bus. & Prof. Code § 2336.

[282] 16 CAL. CODE REGS. § 1364.30.

[283] *Id*. at § 1364.30(e).

75 petitions for reconsideration and five were granted; HQE filed 19 petitions for reconsideration and 10 were granted. While these results appear unfair, they are also somewhat expectable and unsurprising. One expects the prosecution to win most of the time a case goes to hearing; an experienced prosecutor with a weak case will settle prior to hearing, while a respondent with a weak case may decide to "roll the dice," go to hearing, and hope for the best rather than stipulating to discipline. One also expects a respondent to "exhaust his administrative remedies" by challenging every order adverse to his interests (which is why respondents petitioned for reconsideration four times more than did HQE). Finally, one does not expect DMQ to revisit these matters often — the DMQ panel has already reviewed the PD, perhaps held oral argument on it, and ruled on it. In the absence of serious procedural or substantive error, DMQ will be content to let the matter proceed to court.

Section 11521(a) also permits either side to request a short stay of the effective date of the final decision to enable counsel to prepare a petition for reconsideration. Defense counsel contend that whenever HQE files a motion for a stay in order to prepare a petition for reconsideration, it is "always granted." Yet whenever the defense counsel asks for a stay, the request is "always denied." Regrettably, the Monitor did not have an opportunity to request data on that particular component of the process, but anecdotal evidence provided by MBC staff who collect this information indicates that defense counsel are probably correct (just as they were correct about the outcomes of petitions for reconsideration). Defense counsel further charge that MBC's Enforcement Chief (and not the DMQ panel) rules on motions for stay — which is why HQE motions for stay are "always granted" and defense motions for stay are "always denied." According to one defense lawyer, "the Board's staff and enforcement personnel, represented by the Attorney General, are the prosecutors and are adversaries against the physicians. The fox guards the chicken coop when our adversaries can grant themselves stays for purposes of reconsideration. There are no standards which guide the granting of stays. . . . Government Code section 11521 requires the agency itself to hear and deliberate petitions for reconsideration. The agency itself, with a member of the Board signing a formal order, should be the way a stay is acted upon by the Board." That attorney provided the Monitor with an example of a motion for stay filed by HQE that had been approved and signed by the Enforcement Chief. Additionally, the subsequent petition for reconsideration was granted. That order was also signed by the Enforcement Chief, making it unclear to the attorney whether the Enforcement Chief or the DMQ panel actually ruled on the petition for reconsideration.

MBC's *Discipline Coordination Unit Procedure Manual* states that "agency staff are authorized to grant or deny a stay request and need not be elevated to the Chair or President of the voting body. Agency staff includes the Executive Director or his/her designee (*i.e.*, Enforcement Chief or Deputy Chief)."[284] The manual also sets forth three criteria to be used in determining

[284] Medical Board of California, *Discipline Coordination Unit Procedure Manual*, Ch. 30 (revised 12/03).

whether to grant a stay: "good cause, whether or not an opposition will be submitted, [and] the amount time before the decision effective date."[285] Whether or not the stay is granted, the manual goes on to set forth a procedure that clearly indicates that the panel members — not the Enforcement Chief or other MBC staff — decide whether to grant or deny the petition for reconsideration.

Section 11521 is unsatisfactorily unclear about who is required to make the stay decision. It requires the "agency" to rule on motions for stay. The term "agency" is defined as "a board, bureau, commission, department, division, office, officer, or other administrative unit, including the agency head, and one or more members of the agency head *or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head*."[286] The term "agency head" is defined as "a person or body in which the ultimate legal authority of an agency is vested, and *includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide*."[287] Had the drafters of section 11521 intended the DMQ panel to rule on motions for stay, they probably should have used the term "agency head." Instead, they used the term "agency." Thus, it appears MBC is within the law in permitting its Enforcement Chief to rule on motions for stay. However, the Monitor agrees with defense counsel that this appears to be a rather one-sided procedure wherein a representative of the prosecutor is able to make decisions affecting the final outcome of a disciplinary matter.

5. DMQ should notify both parties if it rejects a stipulated settlement.

Defense counsel also complain that when DMQ rejects a stipulated settlement, it notifies only the HQE DAG and not the defense attorney. Sometimes it takes a lengthy period of time for the HQE DAG to contact the respondent's counsel to convey the information that a stipulation has been rejected — during which time respondent's counsel has no information on the fate of his client. Defense counsel assert that "the staff and the DAGs are made privy to the reasons for the rejection of the settlement. OAH and the defense bar should have the benefits of those reasons as well." The Monitor does not agree that defense counsel are necessarily entitled to the reasons for the rejection — those reasons are often communicated by DMQ to HQE in the context of the attorney-client privilege, and are accompanied by instructions to negotiate a "counter-stipulation" that is acceptable

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[285] *Id*.

[286] Gov't Code § 11405.30 (emphasis added). This statute was enacted as part of a wide-ranging effort to reform the adjudication provisions of the Administrative Procedure Act conducted by the California Law Revision Commission in the mid-1990s. The Law Revision Commission's background document on the provision that eventually became Government Code section 11405.30 indicates that its definition of the term "agency" "explicitly includes the agency head *and those others who would act for an agency*, so as to effect the broadest possible coverage" (emphasis added). California Law Revision Commission, *Revised Tentative Recommendation: Administrative Adjudication by State Agencies* (July 1994), at 2.

[287] *Id*. at § 11405.40 (emphasis added).

to the DMQ panel But the fact of the rejection should be communicated to defense counsel at the same time it is communicated to HQE.

C. Initial Recommendations of the MBC Enforcement Monitor

Recommendation #40: DMQ should engage in a public dialogue on the value and costs of DMQ review of proposed decisions and stipulated settlements. We reiterate that little support exists within MBC and HQE for eliminating DMQ review of proposed decisions, but the defense bar and the California Medical Association are concerned about the fairness and consistency of both DMQ decisionmaking and the procedures that result in DMQ decisionmaking.

Recommendation #41: MBC should explore its "precedent decision" authority under Government Code section 11425.60 and begin to make use of it. DMQ in fact commenced a discussion of this issue at its July 2004 meeting, but could not readily identify a "benefit" to the procedure. The benefit is that a well-written legal ruling that represents the will of the Division will become binding on future divisions; should future divisions disagree with the precedent decision, they can un-adopt it as a precedent decision. In the meantime, however, licensees, HQE, respondent's counsel, and OAH can be guided by it as a standard of conduct and it will serve to encourage consistency in subsequent decisionmaking, promote settlements in similar cases, and avoid the time and cost of litigation.

Recommendation #42: DMQ should address the procedural issues raised by defense counsel related to motions for a stay of the effective date of a disciplinary decision in order to file a petition for reconsideration. To preserve both the appearance and actuality of fairness to all parties, MBC enforcement staff should not rule on these motions.

Recommendation #43: Government Code section 11371(c) should be repealed. This subsection, which has never been implemented by MBC or OAH, requires the publication of MQHP decisions and court decisions reviewing those decisions in a *Medical Discipline Report* publication. It has been superseded by Government Code section 11425.60.

Recommendation #44: DMQ should notify counsel for both HQE and the respondent when it rejects a stipulated settlement.

Recommendation #45: Business and Professions Code section 2230(b) should be amended to reflect SB 1950's addition of two new members to DMQ.